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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES EVERETT BOGGESS,

Defendant and Appellant.

F048845

(Super. Ct. No. 05CM1466)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kings County. Peter M. Schultz, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Wanda Hill Rouzan, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Harris, Acting P.J., Cornell, J. and Kane, J.

James Everett Boggess pled guilty to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a))<sup>1</sup> and was sentenced to the midterm of two years, doubled to four years pursuant to Penal Code section 667, subdivision (e)(1). Although phrased differently, Boggess's only argument is that the trial court abused its discretion when it failed to impose a mitigated term. We affirm the judgment.

### **FACTUAL AND PROCEDURAL SUMMARY**

Boggess was driving a vehicle without a rear license plate. When he was stopped for the vehicle code violation, the officer determined he was under the influence of a drug, later determined to be methamphetamine. A usable quantity of methamphetamine was found during a search of his person.

Boggess was charged with transporting methamphetamine (§ 11379, subd. (a)), possession of a controlled substance (§ 11377, subd. (a)), possession of drug paraphernalia (§ 11364), and being under the influence of a controlled substance (§ 11550, subd. (a)). The information also alleged Boggess had one prior conviction that constituted a strike within the meaning of Penal Code section 667, subdivisions (b) through (i).

Boggess pled guilty to possession of a controlled substance and admitted the prior conviction in exchange for dismissal of the remaining charges. He was sentenced to the midterm of two years, doubled to four pursuant to Penal Code section 667, subdivision (e)(1).

### **DISCUSSION**

Boggess argues the trial court erred when it sentenced him to the midterm of two years.

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<sup>1</sup> All further statutory references are to the Health and Safety Code unless otherwise noted.

Boggess pled guilty at the trial readiness hearing. At this plea hearing, Boggess waived his rights and was advised that he would be considered for Proposition 36 treatment (Pen. Code, § 1210 et seq.), but that there was an issue of whether he would qualify because of his strike prior. At this point Boggess stated that he did not think he would qualify for Proposition 36 treatment because he was arrested four days before the five-year anniversary of his release from prison. (Pen. Code, § 1210.1, subd. (b)(1).) The trial court advised Boggess that if he did not qualify for sentencing pursuant to Proposition 36, he would be sentenced to prison for a minimum term of 32 months and a maximum term of six years because of his prior conviction. He also was advised that time credits while in prison would be limited to 20 percent. Boggess stated he understood and his plea was entered.

The first sentencing hearing was continued for one week when counsel was not prepared to address Boggess's questions about the merits of the case. At the continued sentencing hearing, Boggess expressed dissatisfaction with his attorney and a desire to withdraw his plea. The trial court held a *Marsden*<sup>2</sup> hearing. It initially denied the motion but changed its ruling when Boggess insisted on pursuing the matter in open court. The sentencing hearing was continued to permit new counsel to prepare.

At the continued hearing Boggess moved to withdraw his plea based on the contention that he was coerced into accepting the plea by his prior attorney. The sentencing hearing was again continued to permit the parties to present evidence on this issue.

Boggess and his prior attorney both testified at the continued sentencing hearing. The trial court also took judicial notice of the transcript of the plea hearing. The trial court denied the motion. The matter proceeded to sentencing.

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<sup>2</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

Boggess argued the circumstances in mitigation justified imposition of a mitigated term, which would then have to be doubled. The circumstances in mitigation identified by counsel were (1) an early plea and admission; (2) Boggess successfully completed parole on his prior conviction; and (3) if Boggess had been arrested four days later, he would have been eligible for sentencing pursuant to Proposition 36.

Boggess next addressed the trial court. He complained that the search conducted by the arresting officers was illegal, and complained that the person that was with him caused him to ingest the methamphetamine. He also expressed a desire to take care of his family, including his infant daughter, and explained he was employed since he was released from prison. Boggess next attacked his prior attorney.

After the People argued that the midterm sentence should be imposed, Boggess again addressed the trial court. He emphasized that his crime did not harm anyone but himself, and that he did not commit a violent crime. He also promised to remain drug free once out of prison.

The trial court stated it considered granting Boggess relief pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, but declined to do so. The pertinent portion of the trial court's ruling follows:

“Mr. Boggess’ own conduct has eviscerated most of the weight of the mitigation factors here. His early admission of culpability is largely eviscerated by his desperate unsuccessful attempts to set aside his early admission of culpability.

“And his statements to the Court certainly reveal a genuine sorrow for the position that he finds himself in and the punishment that he’s facing, but they reveal no real remorse. He blames some other woman for his possession and use of --

“[INTERRUPTION BY BOGGESS.] [¶] ... [¶]

“THE COURT: He blames the police officer for not advising him of his *Miranda*<sup>[3]</sup> rights, and he falsely blames his prior lawyer for not advising him of the consequences of his plea. I don’t see a great deal of remorse there. I do see self-pity and sorrow.

“Mr. Boggess is committed to the California State Prison for the medium term of two years doubled to four years because of a prior strike.”

Boggess’s argument, as we understand it, is that the trial court utilized Boggess’s motion to set aside his plea as an improper aggravating factor, thus depriving him of a mitigated term. Boggess contends, therefore, that the trial court abused its discretion.

To explain the problem with this argument, we begin with sentencing basics. When a determinate term of imprisonment is to be imposed, the trial court “shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” (Pen. Code, § 1170, subd. (b).) The Rules of Court state this requirement even more succinctly: “The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.” (Cal. Rules of Court, rule 4.420(a).)<sup>4</sup>

The Rules of Court also list circumstances that could be considered aggravating factors (rule 4.421), and circumstances that could be considered mitigating factors (rule 4.423). The listed factors are not exclusive, and the trial court may consider any other circumstances it considers relevant. (Rule 4.408(a); *People v. Brown* (2000) 83 Cal.App.4th 1037, 1044.)

When this framework is considered, it is apparent that Boggess has misunderstood the issue. The trial court imposed the presumptively correct middle term. The mitigated term would be appropriate only if the trial court determined the circumstances in mitigation outweighed the circumstances in aggravation. (Rule 4.420(b).) We review

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<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

<sup>4</sup> All further references to rules are to the California Rules of Court.

such sentencing determinations for an abuse of discretion. (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.) A trial court abuses its discretion only when its choice is arbitrary or capricious, or exceeds the bounds of reason after consideration of all of the circumstances. (*Ibid.*) The issue, therefore, is whether the trial court abused its discretion in refusing to find the circumstances in mitigation justified a lower term.

We reject Boggess's argument for a number of reasons. First, we read the record differently than Boggess. The above quoted portion of the record reveals the trial court considered the various factors contained in the probation report, as well as Boggess's argument, and concluded the factors in mitigation did not outweigh the factors in aggravation.

It is clear the trial court assigned little weight to the mitigating factor of an early admission of culpability because Boggess tried to set aside his plea and proceed to trial. But in so doing the trial court was merely exercising its discretion. A trial court is entitled to minimize or completely disregard a mitigating fact or facts. (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.)

Boggess, however, ignores the factors in aggravation listed in the probation report, including (1) his criminal history indicates a serious danger to society (rule 4.421(b)(1)); (2) his criminal history includes numerous convictions that were of increasing seriousness (rule 4.421(b)(2)); and (3) he has served a prior prison term (rule 4.421(b)(3)). The record demonstrates that the trial court considered each of these factors in reaching its conclusion. The conclusion that the factors in mitigation did not outweigh the factors in aggravation demonstrates a careful application of the applicable statutes and rules. There was no abuse of discretion.

### **DISPOSITION**

The judgment is affirmed.